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Cardinal Newman and Jury Verdicts: Reason, Belief, and Certitude

Colin Moran*

The reconciliation of faith and reason was the dominant concern of John Henry Cardinal Newman's intellectual life. His fifteen "University Sermons" show him wrestling with the subject throughout his twenty years as an Anglican cleric.¹ In *An Essay in Aid of a Grammar of Assent*, written after his conversion to Roman Catholicism, Newman forged his thought on the subject into a more coherent whole.²

Newman insisted that the human ratiocinative faculty depends, to a greater degree than was at the time appreciated, on assumptions and inferences which cannot be put into words. Rationality, in his view, was "any process or act of the mind, by which, from knowing one thing, [the mind] advances on to know another."³ This definition of rationality positioned him to argue that certainty in religious belief was as "reasonable" as many of the non-religious beliefs accepted with certainty by every normal mind in the course of everyday life. Newman sought to show that as in non-religious matters, so in Christian faith, a person may reasonably believe propositions she cannot prove to be true.

Judicial finders of fact also reach definite conclusions on the basis of incomplete proof. Every juror at a criminal trial, like every religious inquirer, must decide on a proposition without verifying the

* Second year J.D. candidate, Stanford Law School. This Article was written at Keble College, Oxford University, during a year-long stay funded by the British government's Chevening Fellowship. My thanks to the Honorable John T. Noonan, Jr., who suggested the analogy between Newman's thinking and the law. Adrian Zuckerman of University College, Oxford, and Peter Hinchliff of Christ Church College, Oxford, offered suggestions as helpful as they were generous. Finally, the sensitive and surgical editing of Michael Adler and the rest of the edit team at the *Yale Journal of Law & the Humanities* significantly improved the piece.

1. JOHN H. NEWMAN, *FIFTEEN SERMONS PREACHED BEFORE THE UNIVERSITY OF OXFORD* (London, Abingden Press 1872) [hereinafter *UNIVERSITY SERMONS*].

2. JOHN H. NEWMAN, *AN ESSAY IN AID OF A GRAMMAR OF ASSENT* (Ian T. Ker ed., 1985) (1870) [hereinafter *GRAMMAR OF ASSENT*].

3. *UNIVERSITY SERMONS*, *supra* note 1, at xi.

conclusion empirically or proving it though explicit logic. Both the religious inquirer of Newman's conception and the juror are forced to reason by probability, which implies qualification and reservation. Yet Newman insists that one may believe religious truth with certitude, and the law presupposes that a juror can reach a conclusion "beyond reasonable doubt."

Observe the similarity between Newman's description of the evidentiary basis of faith and Maine Chief Justice Appleton's charge to the jury in a nineteenth-century murder trial:

Newman: We are so constituted, that if we insist upon being as sure as is conceivable, in every step of our course, we must be content to creep along the ground, and can never soar. If we are intended for great ends, we are called to great hazards; and, whereas we are given absolute certainty in nothing, we must in all things choose between doubt and inactivity.⁴

Chief Justice Appleton: The possibility of error exists whether the evidence be direct or circumstantial. But because you possibly may err, do you refuse to act? Because your wheat may possibly be blighted, do you refuse to sow? Until it pleases Providence to give us means of knowledge beyond our present faculties we must act upon this kind of evidence or grant almost universal impunity to crime.⁵

To defend his view that religious belief was reasonable, Newman developed an elaborate model of the human reasoning process. In his conception, human reasoning proceeds in patterns which are sufficiently distinct and repetitive to be stated as laws.⁶ He holds his model of reasoning out as a description of the way in which minds reach conclusions in all types of inquiry. Religious belief is reasonable, in his view, because it conforms to those general patterns.

This Article explores the analogy between Newman's model of the human reasoning process and the mode of proof in criminal trials. The comparison has two purposes. First, Newman's description of the process of human reason illustrates the mental process by which jurors reach conclusions. Second, analogy from Newman's model of human reason to the way in which jurors reach conclusions permits a "test case" of whether Newman's model accurately describes general patterns of human reasoning.

4. *Id.* at 215.

5. *The Reed Murder Trial*, BANGOR DAILY WHIG & COURIER, Mar. 30, 1874, at 1.

6. Cf. 19 LETTERS AND DIARIES OF JOHN HENRY NEWMAN 114 (Charles S. Dessain ed., 1961) [hereinafter LETTERS AND DIARIES] ("The laws of the human mind . . . command and force it to accept as true and to assent absolutely to propositions which are not logically demonstrated.").

The first Section of this Article briefly sketches the historical context in which Newman wrote. The second Section presents a similarly brief summary of the basic arguments of the *Grammar of Assent*. The third Section compares Newman's description of reason and certitude to those same concepts as they are defined through selected criminal rules of evidence. Within this third Section, I observe the basic similarity between Newman's concept of certitude and the standard of proof in a criminal trial and use the analogy to explore an ambiguity that is common to both: If one can be made surer of a conclusion, does one have certainty?

The Article goes on to pose two questions about jury verdicts: (1) Does the term "moral certainty" add anything to the meaning of the term "beyond reasonable doubt"? and (2) Why does the law not require juries to articulate the evidentiary basis for their decisions? Newman's model of human reasoning suggests original answers to each of those questions.

Next, the Article raises two questions about Newman's argument: (1) Is Newman right that a person can reasonably have absolute certitude in a proposition even though each piece of evidence, viewed individually, is inconclusive? and (2) Is Newman right that a person can have absolute certitude when the sum of evidence, viewed as a corroborated whole, still leaves room for doubt? The rules governing proof in a criminal trial suggest that Newman's approach to the first question is correct. However, with regard to the second question, analogy to the mode of proof in criminal law exposes an elemental flaw in Newman's reconciliation of faith and reason.

I. NEWMAN'S INTELLECTUAL BACKGROUND

Unlike many intellectuals, Newman's impact depends as much on who he was as what he said.⁷ Before elaborating his views on belief and reason, however, it is worth pausing to observe several features of Newman's life and intellectual background.⁸ Born in 1801 to middle class English parents, Newman was an undergraduate at Oxford before becoming an Anglican cleric and fellow of Oriel College. During more than twenty years at Oxford he delivered sermons that mesmerized a generation of undergraduates. William Gladstone, an undergraduate in 1831, said there had not "been

7. Cf. George W. Rutler, *Newman and the Power of Personality*, in *ESSAYS IN HONOR OF THE CENTENARY OF JOHN HENRY CARDINAL NEWMAN: 1801-1890*, at 111 (1989).

8. Two excellent recent biographies of Newman are SHERIDAN GILLEY, *NEWMAN AND HIS AGE* (1990); IAN KER, *JOHN HENRY NEWMAN: A BIOGRAPHY* (1988).

anything like his influence [over a university] . . . since Abelard lectured in Paris.”⁹

Newman came to intellectual maturity during an age of intense confusion for religious believers. By the early nineteenth century, new techniques of Biblical commentary and criticism, widespread social challenges to traditional sources of political and ecclesiastical authority, advances in science, and sophisticated new forms of philosophical agnosticism were leaving believers in traditional Christian faith bewildered and uncertain as to the intellectual defensibility of religious belief.¹⁰

Newman was particularly conscious of the impact of scientific and philosophical developments on religious belief. Scientific investigation, as catalogued by Francis Bacon, depended on empirical observation and logical induction. A reasonable inquirer could test and disprove hypotheses as to scientific truth. If a proposition could not submit to this kind of investigation, the candid mind would classify it as uncertain.¹¹ This scientific skepticism was mirrored in the work of philosophical skeptics like David Hume, who contended that all knowledge derives from sensory impression. Since no person could verify God’s presence empirically through sensory impression, his work suggested that belief in God was not intellectually defensible.¹²

Newman agreed with Hume that rational reflection on the natural world would not lead inescapably to one metaphysical conclusion.¹³ But, unlike other Christian apologists who responded to Hume’s philosophical skepticism, Newman’s adherence to traditional Christian orthodoxy was unquestionable. This combination of orthodoxy and sensitivity to modern currents of thought partially explains his credibility as a modern Christian apologist. It also describes Newman’s intellectual dilemma. Caught between orthodoxy and skepticism, Newman felt “the intellectual pressures of the age as a kind of agony.”¹⁴ His attempt to reconcile faith and reason may be

9. GILLEY, *supra* note 8, at 125.

10. DAVID A. PAILIN, *THE WAY TO FAITH: AN EXAMINATION OF NEWMAN’S GRAMMAR OF ASSENT AS A RESPONSE TO THE SEARCH FOR CERTAINTY IN FAITH* 6 (1969).

11. See Barbara Shapiro, *Law and Science in Seventeenth Century England*, 21 STAN. L. REV. 729, 749-52 (1969).

12. See PAILIN, *supra* note 10, at 7. One nineteenth-century Christian thinker who tried to incorporate the insights of Hume while nonetheless carving out a basis for Christian belief was Friedrich Schleiermacher. He sought to preempt the argument that humans could not have objective knowledge of God by relocating religious belief from the area of knowledge to “feeling” or “self-consciousness.” The difficulty with efforts such as his was that they seemed to reinterpret not only the basis for Christian belief but the substance of the belief itself. See PAILIN, *supra* note 10, at 11.

13. JAMES CAMERON, *Newman and Empiricism*, in *THE NIGHT BATTLE* 219, 236 (1962).

14. JAMES CAMERON, *The Logic of the Heart*, in CAMERON, *supra* note 13, at 203, 207.

seen as an effort to quiet the tension between his own soul and mind. The fact that he returned to the question of faith and reason so persistently throughout his life suggests that *he* needed to know why, and perhaps even if, he could be so certain.

Deeply personal as this struggle was, however, Newman's problem was the religious difficulty of his age and, some would say, of ours.¹⁵ Preternaturally sensitive to the direction in which ideas were moving, he met the powerful new views confronting Christianity not by constructing a philosophical system of thought but by drawing a tentative blueprint for reasonable religious belief. The recurrent theme of his approach was that no certitude, religious or non-religious, could arise from logic alone. Though he conceded that formal logic contributed to certitude, he insisted upon the existence of inarticulable elements of belief as well. His model of human reasoning, which I now summarize, portrays the intellect enmeshed with the mysterious and inarticulable depths of the human soul.

II. SUMMARY OF GRAMMAR OF ASSENT

Grammar of Assent begins abruptly, without introduction or statement of purpose. Newman's exact objective has to be gathered as one reads. The notes of a conversation between Newman and a contemporary, however, explain that Newman's central goal was to show that one may believe, first, what one does not fully understand and, second, what one cannot demonstrate to be true.¹⁶ It is with the second of these arguments that this Article is concerned.

I summarize Newman's argument by defining its key concepts and illustrating them with examples. While his argument is not entirely satisfying in various respects, I defer criticism of it until the final section of this Article.

A. *Assent is Unconditional Acceptance of a Proposition*¹⁷

Newman begins his *Grammar of Assent* by explaining what it means to assent to a proposition. One may approach a proposition in one of three ways: interrogatively, conditionally, or categorically. The interrogative is simply a question—e.g., should one vote for the Tories? If one approaches a proposition conditionally, one is expressing one's agreement with it only to the extent that some other proposition is true—e.g., one should vote for the Tories if their

15. Cf. IAN T. KER, *THE ACHIEVEMENT OF JOHN HENRY NEWMAN* 71-73 (1990) (arguing that Newman anticipated Wittgenstein's "radical critique of skeptical empiricism").

16. 2 JOHN H. NEWMAN, *PHILOSOPHICAL NOTEBOOK OF JOHN HENRY NEWMAN* 153 (Edward Sillem ed., 1969).

17. *GRAMMAR OF ASSENT*, *supra* note 2, at 157-88.

leadership is sound. One who has a categorical attitude to a proposition has dispensed with reservations and simply agrees—e.g., one should vote for the Tories. Each of these three explicit attitudes toward a proposition corresponds with an inner attitude. One may be doubtful towards a proposition, one may accept it inferentially (i.e., conditionally), or one may assent to it. Consider three people, each of whom deposits money in the a bank and is then told that she may recover her entire deposit at will. The first has never before used a bank and thinks to herself, “What a fool I am; my money may be as good as gone.” The second person has had difficulties with banks before and thinks to herself, “Aye, so long as you clerks do not botch the matter.” The last person is a sophisticated financier and conceives the statement to be a self-evident courtesy, equivalent to the assurance, “We’re always ready to help you, sir.” The first doubts, the second infers, and the third assents. The crucial characteristic of assent is that one has no doubt of the proposition in question.

*B. Inference Is Conditional Acceptance of a Proposition*¹⁸

The chief distinction between inference and assent is that one who assents has proceeded so far in her assurance of a proposition that she takes its truth as settled and not dependent on other propositions. Assent is unconditional; inference is conditional. Anytime one says she believes *x* because of *y*, she describes an act of inference.

Newman further distinguishes between formal and informal inference. Formal inference is an act of reason which can be put easily into words. The most obvious example is the logical syllogism. Informal inference refers to reasoning which is not converted easily into words—the ways in which one makes the various large and small decisions and assumptions which permit the mind’s reasoning process to advance. The dismissal of ridiculous propositions, the judgment that one of two inconsistent stories seems more plausible than another, and the ability to find an ordering principle amidst a tangle of confused facts, are all mental operations that the reasoner may execute simultaneously without the ability to perceive or recall separately.

In Newman’s metaphor, a practiced eye may note the faces of two people thirty years apart in age and, without more information, discern that they are members of the same family.¹⁹ If asked, the observer might not be able to articulate the common characteristics

18. *Id.* at 259-330. My summary of informal inference omits the important, related concept of the “illative sense” but does not simplify Newman’s argument in any respect relevant to the discussion in this Article.

19. *Id.* at 190.

which gave rise to the inference of familial relationship. In Newman's emphasis on the inarticulability of much of the reasoning process, we see one of his great advances beyond stale, nineteenth-century rationalism. He was among the first to insist that the complexity of the mind's processes passed beyond the reach of descriptive words.

The mind ranges to and fro, and spreads out, and advances forward with a quickness which has become a proverb and a subtlety and versatility which baffle investigation. It passes on from point to point, gaining one by some indication, another on a probability, then availing itself of an association; then falling back on some received law; next seizing on testimony; then committing itself to some popular impression, or some inward instinct, or some obscure memory; and thus it makes progress not unlike a clamberer on a steep cliff, who, by quick eye, prompt hand, and firm foot, ascends how he knows not himself, by personal endowments and by practice, rather than by rule, leaving no track behind him, and unable to teach another And such mainly is the way in which all men, gifted or not gifted, commonly reason, not by rule, but by an inward faculty.²⁰

Informal inference differs from formal inference in function. Acts of formal inference operate most effectively upon abstractions. The act of abstraction makes the inference easier to express with words, but necessarily less descriptive of any concrete thing. Take the following example: "Robert is manic. Manic people are treatable by lithium. Robert is treatable by lithium." The premise of this syllogism, that Robert is manic, cannot be proved by deductive logic or any other type of formal inference. In point of fact, he may be manic or he may be simply excitable and not need lithium.

A psychiatrist of long experience diagnoses him as manic and in immediate need of lithium. A second psychiatrist, fresh from medical school, finds him to be "brimming with positive energy." The younger doctor makes a more articulate case for his diagnosis than the older doctor, who says only that Robert seems like other manic patients he has treated. The older doctor's aura of competence, the younger doctor's corresponding aura of hastiness, and the parents' own sense that Robert indeed had some sort of serious problem all lead Robert's parents to the ultimate conclusion. They are certain that the older doctor is right and they proceed with the lithium treatment. Thus, through formal inference, the parents learned that the medical treatment for manic depression is lithium. But it was only through informal inference that they concluded the general

20. UNIVERSITY SERMONS, *supra* note 1, at 255-57.

medical rule applied to their son. The cumulation of probabilities so fit together, each corroborating another, that the parents arrived at an assent which was the result of "converging probabilities, a cumulative proof."²¹

C. "*Antecedent Probability*" Refers to the Influence of Premises on Reasoning²²

Newman's concept of "antecedent probability" describes ideas which are related such that the truth of one enhances the probability of the truth of the other. He understood this both as a principle of inductive logic and as a realistic description of human psychology. As a matter of inductive logic, his point was that if x and y are related such that the truth of x enhances the likelihood that y is true, the truth of x creates an antecedent probability for the truth of y. Thus, someone who believes in the existence of God would attach more weight to evidence of divine miracles than an atheist.

Newman added a penetrating psychological twist to this principle of inductive logic. As applied in the religious context, the important antecedent assumptions derive from character traits. Someone who values selflessness is more disposed to believe in the resurrection of a person who taught the giving of all possessions to the poor than is someone who affirms hedonism as a first principle. The principle of antecedent probability, thus understood, explains why an uneducated person could reasonably accept a religious truth which a sophisticated philosopher might nevertheless not find rational.

Given the inarticulable nature of informal inference, it would be difficult to measure the exact influence personal characteristics exert on a person's evaluation of evidence. However, even if the influence were measurable, one would not be much closer to achieving a single probabilistic value for the relevant evidence. The measurement would only expose different antecedent assumptions. Newman wrote:

Half the controversies in the world are verbal ones; and could they be brought to a plain issue, they would be brought to a prompt termination. Parties engaged in them would then perceive, either that in substance they agreed together, or that their difference was one of first principles We need not dispute, we need not prove,—we need but define When men understand each other's meaning, they see, for the most part, that controversy is either superfluous or hopeless.²³

21. 15 LETTERS AND DIARIES, *supra* note 6, at 457.

22. See GRAMMAR OF ASSENT, *supra* note 2, at 183, 194, 213, 245-47, 272-74, 276, 283, 375, 388.

23. UNIVERSITY SERMONS, *supra* note 1, at 177.

For Newman, the point too easily forgotten in debate over religion was that some antecedent assumptions could not be resolved by reason. In such a situation, Newman argued that two people could attach different probabilistic values to the same evidence though both might be reasoning correctly.

*D. Certitude Is Unconditional Belief for Which One Cannot State the Complete Evidentiary Support*²⁴

In defining certitude, Newman tied together his entire argument. Certitude is a type of assent, but it describes only those types of assents which one has self-consciously evaluated. If such self-scrutiny does not reveal some conditionality in one's attitude to the proposition, one has certitude. One who merely assents without reflection has no thought of any doubt but might find one if she examined her assent closely. In contrast, someone who has certitude cannot be made any more sure of the proposition. In Newman's example, a person who has certitude that India exists cannot be made more certain of its existence by personally visiting it.

A second feature of certitude is that the level of probability required having it varies from person to person. One person may have certitude that India exists because she has read about it in a book. Another person may read the book and not believe its existence with certitude until a close acquaintance has visited the place and returned to tell about it.

Finally, and most importantly, no one can ever articulate the complete evidentiary basis for her certitude. This is so for two reasons. First, the process of reasoning that leads to this certainty begins with antecedent assumptions, which do not admit of proof or disproof. Second, one arrives at it through informal inferences, which are inarticulable.

Newman believes that these characteristics describe all certitudes, whether they pertain to religious or non-religious subjects. It is therefore unreasonable to expect a believer to accumulate any particular level of proof for her belief, to weigh evidence in the same way as a non-believer, or to state the grounds on which her certitude rests. Since certitude as to non-religious propositions does not require any of these characteristics, goes his argument, neither does certitude as to religious belief. The difference between religious and secular certitudes is subject matter, not intellectual defensibility.

24. GRAMMAR OF ASSENT, *supra* note 2, at 138-68.

III. ANALOGY BETWEEN NEWMAN'S THEORY OF BELIEF AND THE MODE OF PROOF IN CRIMINAL TRIALS

This third Section compares Newman's description of reason and certitude to those same concepts as they are defined through selected criminal rules of evidence. The comparison is designed to illuminate both Newman's thought and the law. In the first Subsection, I observe the basic similarity between the two and use the analogy to argue that judicial conclusions of fact admit of degree.

In the second Subsection, I use Newman's model to cast light on the mental processes by which juries reach conclusions. First, I argue that the term "moral certainty" should be understood as permitting jurors to base decisions to convict or acquit on personal value judgments. Second, I suggest that Newman's distinction between formal and informal inference explicates the judicial division of labor between judge and jury, and in particular explains why juries do not justify their verdict with a written opinion.

In the third Subsection, I use the law to evaluate Newman's argument that reason in religious matters proceeds according to the same rules as reason in non-religious matters. While analogy to the law bolsters parts of Newman's argument, it also illuminates an important distinction between the evidentiary basis of religious belief and that of non-religious belief.

A. *Scrutiny of Newman's Concept of Certitude Undermines Newman's Position and Legal Commentary That Suggests That Certitude Does Not Admit of Degree*

1. *The Historical Origins of Legal Standards of Proof Reveal Ambivalence as to the Level of Assurance One Can Reach with Probabilistic Reasoning*

The historical origins of modern legal standards of proof emphasize the analogy between Newman and the law in two ways. First, seventeenth-century legal commentary on the subject of proof and certainty reveals the extent to which legal and religious discourse once consciously shared a common terminology. Second, legal standards of proof presuppose reasoning by probability but ambivalence as to whether conclusions so reached could be held unconditionally. This ambivalence reappears in Newman's nineteenth-century description of certitude.

Two of the most authoritative legal and religious voices of the seventeenth century were Sir Matthew Hale and Samuel Pufendorf.²⁵ In debating the truthfulness of the New Testament, Hale focused on the reliability of witnesses, using criteria and terminology transferred directly from the law. One could judge the truthfulness of the Gospels by

the veracity of him that reports and relates it. And hence it is, that that which is reported by many Eye-witnesses hath greater motives of credibility than that which is reported by few; that which is reported by credible and authentic witnesses, than that which is reported by light and inconsiderable witnesses; that which is reported by a person disinterested, than that which is reported by persons whose interest is to have the thing true, or believed to be true . . . that which is reported by credible persons of their own view, than that which they receive by hear-say from those that report on their own view.²⁶

Pufendorf's work explicitly linked moral theology and the law. He argued that morals could be made into a science, the conclusions of which could be just as certain as the conclusions of mathematics and philosophy. Interestingly, Pufendorf employed the modern terminology of the law to describe the conscience. As Pufendorf saw it, the individual searching his conscience and the juror searching the evidence could both apply disinterested reason to arrive at conclusions with certainty. When the conscience saw "no reason to doubt," it could arrive at conclusions "true and certain"; likewise, the juror who evaluated evidence with sufficient care could vote with a "satisfied conscience."²⁷

Seventeenth-century thought distinguished between knowledge and probability. One could have "absolute certainty" of a conclusion if it could be empirically verified, or proven like a geometric theorem. Propositions which could not be verified through sensory observation or logically proved would be affirmed or rejected on the basis of probabilistic judgments. About this kind of proposition, one could have "moral certainty" but not "absolute certainty."

But how reliable was moral certainty? In his *Essay Concerning Human Understanding*, John Locke had cautioned that the one "unerring mark" of a love of truth was "the not entertaining any

25. Barbara Shapiro, *To a "Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HAST. L.J. 161, 167 (1986).

26. MATTHEW HALE, *THE PRIMITIVE ORGANIZATION OF MANKIND* 128 (1677), quoted in Shapiro, *supra* note 25, at 162.

27. SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 11, 17-18 (B. Kennet & W. Percivale trans., 1703), quoted in Shapiro, *supra* note 25, at 167.

propositions with greater assurance than the proofs it is built on will warrant. Whoever goes beyond this measure of assent . . . loves no truth for truth-sake, but for some other by-end.”²⁸ Nonetheless, after setting strict proportionality of evidence to assurance as his standard, Locke went on to speak of “probabilities that rise so near to certainty, that they govern our thoughts as absolutely, and influence all our actions as fully, as the most evident demonstration.”²⁹

The idea is that after a certain mass of evidence builds up in favor of a proposition, the mind ceases to distinguish between high levels of probability and absolute certainty. Newman, as we shall see later, builds much of his case around this alleged tendency of the mind. Neither Locke nor the excerpted jury instruction go far towards explaining why the mind ceases to distinguish between high-level probability and certainty. One explanation is that some conclusions are supported by so much convincing evidence that the possibility of error becomes as imperceptible as an unnoticed crack in a pane of glass.

That explanation, however, glosses over the real disagreement among writers at the time. Some, such as Pufendorf, viewed both moral certainty and absolute certainty as equally reliable. The difference between the terms was only in the mode of reasoning. Others, like John Locke, insisted that all conclusions which could not be sensorially verified or logically proved remained conditional. From Locke’s perspective, the difference in the mode of reasoning necessarily implied a difference in the reliability of the conclusion. As the following section will demonstrate, this disagreement reappears within Newman’s work as an ambivalence in his conception of certitude.

The key point that illuminates both Newman’s thinking and the law is that conclusions on questions of non-verifiable fact imply inductive, probabilistic reasoning. Logical demonstration alone could never prove more than general statements because such logic depends on abstractions. Since a jury exists precisely to make judgments of concrete fact, its conclusions would always be made with moral rather than absolute certainty.

28. JOHN LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* 428 (A.Z. Woolley ed., 1964), *quoted in* GRAMMAR OF ASSENT, *supra* note 2, at 108.

29. *Id.* at 409-10, *quoted in* GRAMMAR OF ASSENT, *supra* note 2, at 107.

2. *Newman's Concept of Certitude Reveals His Ambivalence Between Practical Certainty and Absolute Certitude*

Newman's distinction between conditional inference and unconditional certitude straddles a basic tension between faith and reason. On the road to certitude, a person makes formal and informal inferential conclusions. While no inquiry into a question of non-verifiable fact can ever exclude all doubt, at some point so much evidence accumulates that the human mind ceases to apportion assurance to evidence. The mind simply rests in a state of certitude. Since the mind is already certain, no additional evidence can make it more certain. In Newman's example, a person who had seen India on the map would not be made more certain of its existence by personally visiting it.³⁰ Religious certitude, according to Newman, is simply a version of this pattern of human reasoning. Though the evidence for a religious proposition is not perfectly complete, one is still reasonable to believe with certitude.

In an 1841 sermon, Newman described faith as "the absolute acceptance of a certain message or doctrine as divine; that is, it starts from probabilities, yet it ends in peremptory statements."³¹ Yet immediately after the passage just cited, he wrote:

Though faith be a presumption of facts under defective knowledge, yet, be it observed, it is altogether a practical principle. It judges and decides because it cannot help doing so It is the act of a mind feeling that it is its duty any how, under its particular circumstances, to judge and to act, whether its light be greater or less, and wishing to make the most of that light and acting for the best. Its knowledge, then, though defective, is not insufficient for the purpose for which it uses it, for this plain reason, because . . . it has no more.³²

Newman was unable to resist describing faith in terms which implied that it was an acting assumption rather than an absolute certainty. Fifteen years before writing *Grammar of Assent*, Newman referred to the view that belief was only a practical certainty, and wrote privately, "[L]eft to myself, I should be very much tempted to take [this position]."³³ However, he could not adopt this attitude, apparently because it seemed so unstable a basis for religious faith: "What! the object of worship, faith, and obedience all one's life long, for which one acted . . . day by day and through sorrow and joy, what

30. *GRAMMAR OF ASSENT*, *supra* note 2, at 119.

31. *UNIVERSITY SERMONS*, *supra* note 1, at 298-99.

32. *Id.*

33. *15 LETTERS AND DIARIES*, *supra* note 6, at 456.

mind, if ever so little religious would say he only opined Its existence?"³⁴

In this passage Newman communicates more perhaps than he intended. Sympathetic readers may feel the poignancy of his dilemma as they watch him slide back and forth between the two forms of certainty. Unable to establish a rock-solid evidentiary basis for absolute certitude, he was nonetheless unwilling to describe his incandescent inner experience as a practical probability. Perhaps he feared that tentativeness in assurance would lead the believer to relax her efforts to achieve Christian sanctity.

In *Grammar of Assent*, therefore, the reader hears nothing of anything called "practical certainty." The process of reasoning to find religious faith is presented as a clean leap from conditional inference to unconditional certitude, without a halfway stop for practical certainty. Newman did not resolve the dilemma of early legal writers who disputed whether certainty on questions of non-verifiable fact was conditional or unconditional. Instead, the ambivalence in his elucidation of certitude mirrored their disagreement.

3. *The Criminal Law Standard of Proof Presupposes That There Are Degrees of Certitude, in Contrast to Newman's View That It Does Not*

One of the few times that Newman made explicit analogy to the rules of legal evidence was to support his point that certitude does not admit of degree. Referring to the instruction in a contemporary legal evidence treatise that required the fact-finder to "exclude a rational probability of innocence" before voting guilty, Newman argued that this degree of proof presupposed evidence "free from anything . . . [which] would hinder that summation and coalescence of the evidence into a proof, which I have compared to the running into a limit, in the case of mathematical ratios."³⁵

In this characterization of the criminal law standard of proof, Newman might have found specific support in a recent treatise on the principles of criminal law.³⁶ In Adrian A.S. Zuckerman's view, the "beyond a reasonable doubt" standard is "the highest attainable standard for the proof of guilt."³⁷ By "highest attainable," Zuckerman means not the highest assurance which can be attained without witnessing the crime, but the highest assurance of which the mind is capable, whether a person has seen the crime firsthand or not. "The

34. *Id.*

35. UNIVERSITY SERMONS, *supra* note 2, at 210.

36. ADRIAN A.S. ZUCKERMAN, PRINCIPLES OF CRIMINAL LAW 134-41 (1989).

37. *Id.* at 134.

highest attainable standard," he writes, "is one that so approximates to certainty as to make no difference."³⁸ One has to admit the "theoretical possibility" of error, but insofar as a juror's evaluation of the evidence is concerned, this possibility is "imperceptible."³⁹ Every juror who properly votes for a guilty verdict *feels* as certain of the defendant's guilt as if she witnessed the accused perform the crime firsthand.

This account of the highest legal standard of proof is difficult to sustain. The central problem lies in its equation of "perceptible doubt" with "reasonable doubt." Zuckerman understands a doubt to be imperceptible when "we cannot assign it any probative value."⁴⁰ This evades the whole difficulty. Almost any hypothesis has *some* probative value. The question, therefore, is not when a doubt does or does not have any probative value, but when its probative value becomes so small that *the particular juror in question* deems it inadequate to support a vote of innocence.

Zuckerman's own example is illustrative. He posits a defendant who has been seen fleeing the scene of a mugging.⁴¹ A policeman testifies to having found the reportedly stolen wallet in the defendant's home. The defense explains that the accused was running for a train and knew nothing of a stolen wallet in his home. In Zuckerman's view, the prosecution banishes reasonable doubt when it shows that no trains were running at that time and that the defendant actually used the wallet.⁴² He concedes the possibility that the accused erroneously believed there was a train at the time, and used the wallet without realizing it was not his, but dismisses such an explanation as having "no perceptible probability."⁴³

Here Newman's distinction between that level of assurance which is so great that nothing can make one more sure—certitude, by his definition—and lesser levels of assurance becomes illuminative. One can imagine that the juror in Zuckerman's hypothetical, consistent with her vote of guilty, would feel more at ease if the prosecution presented additional evidence, such as information that the defendant, so far from being absent-minded, was renowned among friends for meticulous attention to small details. If the addition of more evidence could strengthen a juror's assurance, that juror's original doubt was perceptible but not reasonable. Though Newman and Zuckerman actually share the view that certitude does not admit of degree,

38. *Id.* at 135.

39. *Id.*

40. *Id.* at 134.

41. *Id.* at 135.

42. *Id.*

43. *Id.*

Newman's clear definition of certitude helps illuminate the flaw in Zuckerman's elucidation of "beyond reasonable doubt." Doubt may be perceptible but not reasonable.

Newman and Zuckerman face the same difficulty. They both imply that a juror who could be made any more sure of guilt should not vote for conviction. This view is not only intuitively difficult to accept, it is contradicted by the legal case which Newman relied upon as an example. The case depended solely upon circumstantial evidence against the defendant and did not "directly prove the actual crime."⁴⁴ Counsel for the defense had suggested to the jury members that they could not find his client guilty "unless they were as much satisfied that the prisoner did the deed as if they had seen him commit it."⁴⁵ The judge disagreed. "That is not the certainty . . . which is required of you to discharge your duty to the prisoner . . . [but rather] that degree of certainty . . . with which you decide upon and conclude your own most important transactions in life."⁴⁶

Newman seems half-aware of the difficulty posed to his argument by the judge's explicit reference to "degree of certainty." His explanation is that the judge was referring to "degrees of proof, or approximations towards proof, and not certitude, as a state of mind."⁴⁷ By Newman's own account, though, the rejected jury instruction referred not to degrees of proof but to the jury's state of mind: "[T]he [j]ury could not pronounce a verdict of *guilty* unless *they were as much satisfied* that the prisoner did the deed as if they had seen him do it."⁴⁸ If, as Newman contends, a mind which feels certitude cannot feel any greater assurance, why did the judge correct the counsel? Newman's view that there could be no degrees of certitude should have led him to commend the defense counsel's suggestion to the jury, for it was the counsel's advice to the jury, and not that of the judge, which perfectly matched Newman's example of the person who could not be made more certain of India's existence by going to India. Both the defense counsel and Newman were saying that certitude is certitude; if any evidence could possibly make one feel more confident of a proposition's truth, one lacks certitude. The court disagreed.

The question of whether legal or religious certitude admits of degree exemplifies the way Newman and the law illuminate one another. Both Newman's concept of certitude and Zuckerman's

44. GRAMMAR OF ASSENT, *supra* note 2, at 211 (quotation not cited in original).

45. *Id.*

46. *Id.*

47. *Id.* at 210.

48. *Id.* at 211 (emphasis added).

elucidation of “beyond reasonable doubt” share a common ambiguity as to the degree of assurance which accompanies conclusions of fact. Newman’s subjective but strict definition of certitude—the evidence threshold varies from person to person but it must so convince the fact-finder that she cannot be made more sure—leads to the insight that a juror’s exclusion of “reasonable doubt” need not be the highest attainable state of assurance.

That clarification, ironically, ricochets to undermine both academic descriptions of the “reasonable doubt” standard and Newman’s definition of certitude. Since certainty in the law is something less than a conclusion of which one cannot be made more sure, it resembles an acting assumption rather than Newman’s certitude. I argued earlier that Newman’s strict definition of certitude papered over an ambivalence as to whether religious faith resembled practical certainty or an assurance of which one could not be made more sure. His own analogy to the certainty required of a jury for a guilty verdict serves to emphasize this fracture in his thinking. The practical certainty required of juries illustrates the fact that people make life and death decisions on the basis of something less than absolute certainty as he defined it. This observation does not destroy Newman’s case for the reasonableness of religious certitude. It does demonstrate, however, that Newman overstated the equation between religious certitude, as he understood it, and other forms of certainty.

B. Newman’s Model of Human Reasoning Suggests Original Explanations to Two Questions About the Process of Jury Fact-Finding

In this subsection I employ Newman’s understanding of reason and certitude to answer two questions about the process of reasoning by which a jury reaches conclusions of fact. The first question arises from Newman’s emphasis on the role of morality in the reasoning process. Does a juror only analyze evidentiary probabilities or does she also make moral judgments that require some guidance from conscience? I argue that she legitimately makes moral judgments. Second, since a judge is expected to justify the legal basis for a ruling of law, why does a jury not articulate the evidentiary basis for a conclusion of fact? Newman’s model explains that the mental process of arriving at decisions of fact is more difficult to render in words than the mental process of arriving at decisions of law.

1. *Newman's View That the Level of Proof Necessary for Certitude Is Subjective to Each Person Suggests an Explanation for the Meaning of the Term "Moral Certainty"*

While courts have long used the term "moral certainty" to elaborate the criminal trial standard of proof,⁴⁹ the practice has drawn severe criticism over the past two decades. Justice Stanley Mosk of the California Supreme Court attacked jury instructions that equated the term "moral certainty" with "beyond reasonable doubt" because he thought the phrase would confuse jurors.⁵⁰ "I'd like to hear someone attempt to tell . . . [us]," he challenged, "what 'moral certainty' is."⁵¹ Objections to the term even reached the U.S. Supreme Court in *Victor v. Nebraska*.⁵² While the Court refused to find use of the term in jury instructions unconstitutional,⁵³ it expressed concern that the phrase might encourage jurors to apply "a standard of proof lower than due process requires" and to allow "convictions on factors other than the government's proof."⁵⁴ Justice Blackmun, concurring and dissenting, warned that the term would lead jurors to convict "based in part on value judgments . . . particularly where the defendant is alleged to have committed a repugnant or brutal crime."⁵⁵

In the previous Section, I argued that the "beyond a reasonable doubt" standard should not be interpreted to mean a degree of juror assurance which could not be increased. That description places the threshold too high. On the other hand, the U.S. Supreme Court has held that "grave uncertainty" or "substantial doubt" are terms that would encourage a juror to place the standard of proof unconstitutionally low.⁵⁶ In between those general boundaries, a juror, like Newman's religious believer, must define the threshold of certainty for herself. The more accurate way of understanding reasonable doubt, therefore, is not as an objective threshold of proof but as the level of probability which each juror deems sufficient to

49. See, e.g., *Wilson v. United States*, 232 U.S. 563, 570 (1914) (approving reasonable doubt instruction defined through reference to moral certainty); *Fidelity Mut. Life Ass'n v. Mettler*, 185 U.S. 308, 317 (1902) (holding that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond reasonable doubt'").

50. *People v. Brigham*, 599 P.2d 100, 107-21 (1979) (Mosk, J., concurring), *quoted in* Shapiro, *supra* note 25, at 153-54.

51. *SAN FRANCISCO CHRON.*, May 6, 1988, at 9, *quoted in* Shapiro, *supra* note 25, at 154.

52. 114 S. Ct. 1239 (1994).

53. *But cf. Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (holding that jury instructions requiring "grave uncertainty" and "substantial doubt" for conviction, in conjunction with term "moral certainty," violated Due Process Clause).

54. *Victor*, 114 S. Ct. at 1248.

55. *Id.* at 1258 (Blackmun, J., concurring in part and dissenting in part).

56. *Cage*, 498 U.S. at 41.

vote for conviction. In the following discussion, I argue that conscience, rather than reason, is what a juror necessarily uses to determine that threshold. Conviction “beyond a reasonable doubt” is, in this sense, a “moral certainty.”

This understanding of “moral certainty” implies a threshold of proof no different than that traditionally required in criminal cases. Yet the meaning I ascribe to the term seems to epitomize Justice Blackmun’s fear that the term encourages jurors to base convictions “in part on value judgments.”⁵⁷ Unlike Justice Blackmun, however, I do not view such value judgments as always illegitimate. They are, in all events, inevitable.

The term “moral certainty” echoes the concept of legal proof used in the sixteenth and seventeenth centuries, when there was less concern with rationality and impartiality and more reliance on jurors’ pre-existing knowledge of events.⁵⁸ The jury as an institution arose in communities where crimes requiring juries were few and in which many of the details of the case were already known to members of the jury before the trial.⁵⁹ While methods of utilizing individual jurors’ knowledge of the case varied, it was generally accepted that such knowledge could be introduced into deliberations. Even in the seventeenth century, courts had not fully implemented the modern rule that a juror must consider only information submitted in court. In 1650 an English judge ruled that a juror could present evidence to the court, so long as he was heard under oath,⁶⁰ and as late as 1670 a judge ruled that jurors could deliberate and vote based on their own knowledge of the case as well as evidence presented at trial.⁶¹

This greater role for an individual juror’s knowledge coincided with a greater role for the individual juror’s conscience. Jury instructions suggested that it was the juror’s responsibility not only to evaluate evidence in terms of its accuracy, but to see that justice be done in some larger sense. The juror was often instructed to convict only if she was “satisfied in [her]. . . particular Understanding and Conscience” of the “truth and Righteousness of . . . [the] verdict.”⁶²

57. *Victor*, 114 S. Ct. at 1258 (Blackmun, J., concurring in part and dissenting in part).

58. In *Victor*, the Court noted a point already made in this Article, that the term “moral certainty” originally described the type of conclusion based on probability, as contrasted with a conclusion of absolute certainty. *Id.* at 1246; see also *supra* text accompanying notes 31-32. This is certainly one aspect of the history of the standard of proof, but it omits those aspects of the term’s history which I emphasize here.

59. Shapiro, *supra* note 25, at 163 n.23.

60. *Benett v. Hartford*, 82 Eng. Rep. 871 (K.B. 1650), quoted in Shapiro, *supra* note 25, at 163 n.23.

61. *Bushell’s Case*, 124 Eng. Rep. 1006, 1013 (C.P. 1670), quoted in Shapiro, *supra* note 25, at 163 n.23.

62. Shapiro, *supra* note 25, at 165.

One court instructed jurors to convict only upon a “fully satisfied conscience”; another “according to their Conscience and the best of their Judgment.”⁶³

It might be argued that conscience, in this context, has nothing to do with questions of fact: Whether the accused in fact committed the crime is different from whether the accused ought to be convicted for it. However, the line between fact and justice is not clear. A juror who feels no sympathy for a defendant may still have difficulty deciding whether her doubts are reasonable or unreasonable. A juror’s intellect can analyze the evidence and make the informal probability judgments which permit her to estimate where she is in relation to absolute certainty. Her intellect cannot tell her, though, how close she must be in order to vote for conviction. Within the rough and imprecise bounds set by the jury instructions, that accommodation will arise out of the juror’s subjective understanding of justice.

To pose as blunt an example as possible, suppose a juror, who defines “beyond reasonable doubt” as “a percentage in the upper nineties” sits consecutively in two trials. The defendant in the first trial has stolen the proverbial loaf of bread to feed her family and the juror crudely estimates a 98% chance of guilt. The defendant in the second trial is accused of rape and the judge has admitted evidence that the defendant has a history of similar violent assaults. The juror just as crudely estimates this defendant to be 95% guilty. In deciding both cases, she has to weigh the danger of unjust conviction against the value to society of convicting a criminal. If she were a pure rationalist, she might avoid this balancing process by imposing the same probability threshold on both defendants. However, even a commonly applied threshold would represent a balancing of those two values. Moreover, because no jury instructions require a juror to apply the same probability threshold to all cases, her decision to impose the same probability threshold is itself a value judgment she has introduced into the criteria for conviction. This judgment can come from nowhere else but her “faculty of . . . apprehending the difference between right and wrong.”⁶⁴

The word “moral,” strictly defined, is used to distinguish “between right and wrong . . . in relation to the actions . . . of responsible beings.”⁶⁵ Where the action in question involves branding a person a criminal, the old instructions to convict only with a “satisfied conscience” may have been more candid than the term “reasonable

63. *Id.*

64. OXFORD ENGLISH DICTIONARY 1068 (J.A. Simpson ed., 2d ed. 1989).

65. *Id.*

doubt.” To suggest that excluding reasonable doubt is a purely epistemic matter is to forget that each juror must choose her own threshold of proof and that this choice is necessarily a moral one.

Our legal system’s present use of the term “moral certainty” may be just an archaic way of saying that a jury need not have absolute certainty to convict. Yet if that were the only purpose of the term, courts could easily have adopted a more value-neutral phrase, such as “practical certainty,” to express the same concept. Even if “moral certainty” is the muted descendant of the “satisfied conscience” standard, modern courts obviously will not make the connection explicit for fear of encouraging jurors to draw inappropriately on private moral judgments to alter the standard of proof. Nevertheless, the juror’s “satisfied conscience” continues to be a threshold for conviction. While the intellect may scale the continuum towards certainty, only conscience can tell the mind it has reached its provisional plateau—moral certainty. Authorities who seek to discard “moral certainty,” such as Justices Blackmun and Mosk, may disguise this aspect of the judicial fact-finding process. They cannot change it.

2. *Newman’s Distinction Between Formal and Informal Inference Suggests an Original Explanation for the Distinction Between Questions of Law for the Judge and Questions of Fact for the Jury*

Generally speaking, a judge’s role in a criminal trial is to decide questions of law; questions of fact are reserved for the jury.⁶⁶ A judge normally justifies her judgment with a written opinion, whereas juries present bare verdicts. An appeals court may review a judge’s ruling, point to errors in her reasoning, and overrule the decision. But a jury’s conclusions of fact are generally not reviewable. Why would a rational process of guilt determination not require juries, like judges, to state the grounds of decision?

A host of practical administrative considerations suggest that such a requirement would be prohibitively inconvenient. But Newman’s model of the human reasoning process provides a compelling explanation of why juries ought not be required to state the grounds of decision, even absent the administrative inconvenience.

Recall Newman’s distinction between formal inference and informal inference.⁶⁷ By formal inference, Newman referred to reasoning

66. *Sparf v. United States*, 156 U.S. 51, 66-67 (1895). For instance, in the trial of an accused murderer who pleads not guilty by reason of insanity, the judge will determine jury instructions which represent relevant law on the insanity defense. The jury then evaluates the evidence and applies the abstract instruction to the particular defendant on trial.

67. See *supra* text accompanying notes 19-21.

which could be put into words. The more words are made precise and exact, "the less they have to do with . . . concrete reality."⁶⁸ Formal inference, Newman observed, requires universal propositions and "comes short of . . . concrete issues."⁶⁹ It achieves precision at the expense of concreteness. The informal inferences that are necessary to apply any general proposition to a particular object are more difficult to express in words. Newman noted that informal inference

does not supersede the logical form of inference, but is one and the same with it; only it is no longer an abstraction, but carried out into the realities of life, its premises being instinct with the substance and the momentum of that mass of probabilities, which, acting upon each other in correction and confirmation, *carry it home definitely to the individual case.*⁷⁰

The means by which a judge and a jury collaborate to produce a verdict in a criminal trial constitute a rough institutional expression of the distinction between formal and informal inferences. The judge decides abstract questions of law, and must be ready to support his conclusions with formal inferential reasoning. By Newman's understanding of reason, the general and abstract character of decisions of law makes them acts of formal inference. Written justifications of formal inferences are appropriate, since their abstractness renders them easily articulable. By contrast the jury resolves questions of concrete fact and need never justify the inferential steps which lead to its decision. Newman's model of human reasoning suggests that this absence of explanation for a jury verdict is appropriate to the type of reasoning involved. Resolution of questions of fact requires informal inferences which are difficult to render in words.

C. Newman's Account of the Evidence Necessary for Certitude Finds Only Qualified Support in Analogy to the Law

In Newman's mind, the central challenge to the argument that faith is consistent with reason is the believer's inability to adduce evidence equal to her certitude in Christian dogma. At the heart of *Grammar of Assent*, therefore, is the argument that one may believe a proposition even if one cannot prove it. This argument creates a variety of difficulties. Sir Anthony Kenny poses one of them: Can absolute certitude of a proposition's truth rest upon an accumulation

68. GRAMMAR OF ASSENT, *supra* note 2, at 185.

69. *Id.* at 172.

70. *Id.* at 190 (emphasis added).

of evidentiary judgments, when each of those judgments, viewed in isolation, leaves room for doubt?⁷¹ Put more succinctly, can any conclusion be stronger than its weakest link? A second question is similar to the first, but more difficult for Newman's argument. How can Newman be certain of religious faith while acknowledging that the sum of the evidence is imperfect? As the previous subsection used Newman's description of reason and certitude to answer questions about law, this subsection uses the law to address these two questions about Newman's description of reason and certitude.

1. *Analogy to the Rules of Criminal Evidence Supports Newman's View That an Accumulation of Individual Bits of Evidence, Each Inconclusive in Isolation, May Provide a Reasonable Ground for Certitude*

Rejecting systematic logical deduction as a basis for religious faith, Newman relied upon a web of interrelated probabilistic judgments to support certitude. Thus his metaphor, "I liken [certitude] to the mechanism of some triumph of skill, where all display is carefully avoided, and the weight is ingeniously thrown in a variety of directions, upon supports which are distinct from, or independent of each other."⁷² Sir Anthony Kenny finds fault with this approach on the ground that no conclusion can ever be more certain than the most reliable piece of evidence supporting it.⁷³ In Kenny's view, Newman fails to understand that "evidence has to be better known than that for which it is evidence."⁷⁴

Kenny's argument neglects the significance of corroboration. An unreliable piece of evidence may fit into a larger assemblage of bits of evidence, each of which is similarly unreliable. Yet all of them together may corroborate each other and the central proposition, thus contributing to a conclusion that is more probable than any individual piece of evidence supporting it.

For example, imagine that ten witnesses all claim to have seen a defendant at different times on the night of a murder. Each reports seeing him perform some activity which, if true, enhances the probability of his guilt. Suppose further that the case is sensational and that the jury members suspect that up to three of the witnesses are fabricating their stories to become talk-show guests. The jury also concludes that the testimony of any seven of the witnesses suffices to

71. Anthony Kenny, *Newman as a Philosopher of Religion*, in *NEWMAN: A MAN FOR OUR TIME* 99, 118 (David Brown ed., 1990).

72. 19 LETTERS AND DIARIES, *supra* note 6, at 460.

73. Kenny, *supra* note 71, at 118.

74. *Id.*

exclude reasonable doubt. In this situation, the accumulation of witnesses' testimony convinces the jury beyond a reasonable doubt of the defendant's guilt, though the jurors may harbor a reasonable doubt as to the credibility of each of the witnesses.

In a slightly different context, the U.S. Supreme Court recently rejected an implication that evidence has to be better known than that for which it is evidence. In *United States v. Bourjaily*,⁷⁵ the Court admitted out-of-court statements into evidence as testimony. It indicated that while out-of-court statements were generally not admissible, a judge could admit such evidence if there was proof of a conspiracy between the accused and the person whose testimony was in question.

[O]ut-of-court statements are only presumed unreliable. The presumption may be rebutted by appropriate proof. . . . [I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, *unreliable in isolation, may become quite probative when corroborated by other evidence*.⁷⁶

To the extent that the U.S. Supreme Court's position accurately represents common-law rules of evidence in general, those rules defend Newman's view that one may hold a conclusion with greater assurance than any individual probabilistic judgment supporting it.

2. *Newman's Insistence That One's Assurance May Exceed the Sum of Supporting Evidence Seems to Distinguish Religious Belief from Non-Religious Forms of Belief*

The more difficult question Newman's argument raises is whether one's assurance can exceed the *sum* of the evidence, viewed as a corroborative whole. One of Newman's more sympathetic critics, Basil Mitchell, made this argument against Newman: While informal accumulations of evidence may amount to certainty on some questions, the argument for the truth of Christian dogma clearly does not.⁷⁷ According to Mitchell, Newman responds to this charge by "conced[ing] the inadequacy of argument for Christian belief in so far as it is based on 'the evidence,' but insisting that any such argument is inevitably incomplete, because no account has been taken of the

75. 483 U.S. 171 (1987).

76. *Id.* at 179-80 (emphasis added).

77. Basil Mitchell, *Newman as a Philosopher*, in *NEWMAN AFTER A HUNDRED YEARS* 222 (Ian Ker & Alan G. Hill eds., 1990).

antecedent assumptions which the particular reasoner brings to the evidence.”⁷⁸

Mitchell is right to emphasize the importance of antecedent assumptions to Newman’s argument. Newman is at his most original in demonstrating that if people differ in first (antecedent) principles, then (a) they will attach different probabilities to the same evidence, and (b) logic alone will not reconcile their views. Whether there is enough evidence to justify religious certitude is, therefore, an inescapably relative question. Those who share Newman’s set of antecedent assumptions and principles will view the articulable evidence as establishing a higher probability case for Christian dogma than those who do not. Mitchell then goes on to explore the difficulties with Newman’s assumption that *his* first principles are true.

Mitchell glosses over, however, the evidentiary deficit which Newman faces whether or not he successfully establishes his first principles. Many who accept the creed of the Roman Catholic Church share Newman’s antecedent principles,⁷⁹ but do not find his evidence sufficient to approximate the probability of other clear truths, e.g., the existence of India. Newman himself did not seem to think that his statable evidence was that strong either. He had much to say about the way in which evidence could mount so high as to be indistinguishable from certitude. The process was like “the running into a limit, in the case of mathematical ratios.”⁸⁰ With regard to the evidence he could adduce for his own religious belief, however, he cautioned that no one should “claim for his conclusions an acceptance or a scientific approval which is not to be found anywhere, but [can do no more than state] what are personally his own grounds for his belief in Natural and Revealed Religion.”⁸¹

Contrary to Mitchell’s representation, Newman did not necessarily think Christian belief lacked sufficient evidence. Rather he thought that the evidence was not always articulable.⁸² In all modes of

78. *Id.* at 229.

79. To discuss the possibility of someone sharing Newman’s antecedent principles raises a difficult question about his argument. Since Newman thought that a person’s first principles arose from her unique personality, he might have been tempted to deny the possibility that any two people can start from the same set of first principles. But that would push his argument into a tautology, since it would permit any difference of conclusion to be explained as a difference in first principles. The better interpretation of his argument, which I have employed in the text, is that people of like religious outlook could agree upon a common set of premises for purposes of religious inquiry.

80. *GRAMMAR OF ASSENT*, *supra* note 2, at 210.

81. *Id.* at 249.

82. Newman did, in fact, declare that the tenants of Christianity had to adduce evidence like any other proposition, but he added that he “would only maintain that the proof need not be the subject of analysis, or take a methodical form, or be complete and symmetrical.” *UNIVERSITY SERMONS*, *supra* note 1, at 199-200.

human inquiry, he argued, men act on evidence which they cannot put into words, of which they may not even be aware. He supplies a variety of examples to support this view, such as the person who observes a familial resemblance between family members but cannot specify which facial features are similar,⁸³ and Napoleon's ability to view a battlefield and know immediately the manner in which enemy troops would be arranged.⁸⁴

A hypothetical example makes Newman's point clearly. Imagine that it is useful to the owners of a poultry farm to identify chick gender immediately after the chick emerges from the egg. The indicia of gender are extremely difficult to identify in chicks so young. Nonetheless, it turns out that some people can look at chicks and reliably determine gender. If asked to specify the characteristics used to make the judgment, they cannot explain. They simply realize the truth of the matter, and cannot adequately articulate the means by which they arrive at it.

Here, Newman might say, is a perfect example of the mental pattern which corresponds to religious belief. The inner assurance of God cannot be put into words and leaves the believer in no doubt as to the truth of Christian dogma. If pressed, this person can point to evidence, as Newman does in the last chapter of the *Grammar of Assent*. But this stated evidence will express only a portion of the evidence that is present in the experience of the believer. The devout person, like the chick gender selectors, believes without the ability to state the full grounds for belief. "Every man has a reason," Newman wrote, "but not every man can give a reason."⁸⁵

There is an important difference, however, between the case of the chick gender selector and that of the religious believer, a difference which Newman never acknowledges. The inarticulable judgment of a particular chick gender selector is only credited when subsequent events reveal that this particular person's inarticulable judgments are, in fact, reliable. Likewise, we would trust Napoleon's snap judgments as to troop placements because he generally went on to win the battle. On the other hand, we would not be reasonable to continue trusting a person's ability to see family resemblances if the person repeatedly proved incorrect. When a person cannot articulate a reason for his conclusion, placing confidence in his conclusion is not necessarily reasonable. The reasonableness of the confidence does

83. GRAMMAR OF ASSENT, *supra* note 2, at 190.

84. *Id.* at 216.

85. UNIVERSITY SERMONS, *supra* note 1, at 259.

depend upon evidence, even if the evidence is demonstrably reliable judgment rather than articulated reasons.⁸⁶

Newman wishes to maintain that the intellectual process that leads to religious belief is no different in kind from that which leads to conviction in non-religious matters. Yet nearly all the secular certitudes that Newman cites share the quality of *ex post* verifiability. It is difficult to imagine an *ex post* means of verifying the reliability of judgment in Christian dogma. Certainly Newman does not articulate any way of verifying religious judgment.

What, however, of the parallel between the evidentiary basis for religious belief and the evidentiary basis for jury verdicts? As noted earlier, Newman's concept of informal inference offers a compelling explanation for the fact that juries render verdicts but not explanations.⁸⁷ Both the juror who votes to convict and the religious believer arrive at a conclusion of fact through the exercise of informal inference. Neither can articulate all the evidence for her conclusion. More importantly, in light of the criterion of *ex post* verifiability, no clear evidence demonstrates that jurors' judgments are sound. For instance, no test has ever shown that juries convict only guilty defendants, or do so within an acceptable margin of error. In this sense, to the extent that the legal system trusts jury verdicts, it does so in the same way that Newman trusts his religious judgment—without *ex post* verification of the judgment's accuracy.

To elaborate this point, consider a defense counsel lawyer debating one of the twelve jurors who has just voted to convict his client. A proponent of strictly defined rationality would expect the juror, by herself, to make a stronger argument for guilt than the defense attorney's argument for innocence. If one favors Newman's account of rationality, however, one might continue to believe in the jury verdict even if the defense counsel made out a stronger case. One's confidence in the verdict depends upon the soundness of the juror's judgment as much as the juror's ability to articulate reasons for the decision.

The difference between Newman's religious certitude and the conclusion of the jury, however, is that we have experience in everyday life with citizens who sit on juries. That experience tends to show that they have a certain limited competence in matters of factual inquiry. We apportion our confidence in jury verdicts in relation to our general sense that citizens are competent and responsible in the

86. I am indebted to Mr. Adrian A. S. Zuckerman of University College, Oxford, for the example of the chick gender selectors and for the insight that Newman's account of judgment evades the question of verifiability.

87. See *supra* text accompanying notes 66-70.

matters of factual inquiry similar to those facing a jury. A person's level of confidence in the accuracy of jury verdicts is only reasonable if it is so apportioned. But Newman offers no comparable way in which religious believers apportion their confidence in religious judgment to its proven ability at reaching right results.

In sum, the fact that jury verdicts, like other non-religious factual conclusions, are accepted without justification offers only qualified confirmation of Newman's view that a rational person's degree of assurance can exceed articulated evidence. It is true that judgment, as well as articulable evidence, can provide a sound basis for certainty. However, judgment normally must prove its reliability in reaching correct conclusions. In trusting his religious judgment absolutely, Newman faced the same problem that he confronted in insisting that certitude would not admit of degree.⁸⁸ His description of religious certitude distinguishes it from, rather than identifies it with, certitude in secular matters.

IV. CONCLUSION

Though Newman possessed a profoundly original mind, he was not a systematic thinker. Both this strength and this weakness are evident in *Grammar of Assent*. The central purpose of his book was to identify characteristics of human reason that were common to both religious belief and belief in non-religious matters. Analogy to jury verdicts confirms part of his argument. In particular it defends Newman's argument from those who, with Sir Anthony Kenny, believe that "evidence has to be better known than that for which it is evidence."⁸⁹

Yet Newman clearly overstated the similarity between religious belief and non-religious belief. His effort to equate religious certitude, which does not admit of degree, with jury verdicts, which clearly do, was unsuccessful. More importantly, he failed to provide any *ex post* means of verifying religious judgment.

This raises the question of whether Newman's failure to provide an *ex post* means of verifying religious judgment necessarily disables his argument that religious belief is as reasonable as any non-religious belief. I think that it does not. A rescue of Newman's case would begin by identifying a subject in which conclusions are reasonable though the judgment which produces them is not demonstrably reliable. Morality provides the most obvious supporting example for this point. If a person derives pleasure from being cruel to others and

88. See *supra* text accompanying notes 46-48.

89. Kenny, *supra* note 71, at 118.

values only evidence and reason, not kindness or selflessness, no argument will dissuade her from further cruelty. Anyone who wishes to maintain a moral belief with certitude relies not solely upon evidence but on some inner sense, the veracity of which is discerned in one's conscience rather than formally proved. To justify moral beliefs, it might be argued, scientific or legal standards of reason and evidence are inadequate. The same is true, Newman might argue, in the case of religious belief.⁹⁰

This approach, of course, raises a whole new set of problems, too extensive to be treated in this Article. My purpose here is simply to suggest that Newman's failure to identify a strict conformity between reason in religious matters and reason generally, does not necessarily defeat his argument. He might have salvaged it simply by narrowing his model of reason to include only those types of certitude that resemble religious belief most closely, such as moral belief.

Yet Newman's efforts to identify the similarities between religious and secular certitudes is precisely what produced his piercing psychological and analytical insights into reason in secular matters. His strict definition of certitude as something of which one cannot be more sure clarifies the concept of "beyond a reasonable doubt." That clarification, together with his original explanation of morality's role in the reasoning process, suggests that conscience, as well as evidentiary analysis, is necessary to achieve "moral certainty." And his distinction between formal and informal inference explains why a jury might not be able to offer a written justification for a reasonable verdict.

In sum, analogy to jury verdicts demonstrates that Newman's model was not the general description of human reasoning that he believed it to be. It was, however, his effort to describe reason generally, to identify connections between reason in religion and reason in secular matters, that makes his work so fertile a source of insight into jury verdicts.

90. For an elaboration on this approach, see CAMERON, *supra* note 13, at 216.

